# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 588

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRADFORD DYEING ASSOCIATION (U. S. A.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

## REPLY BRIEF FOR BRADFORD DYEING ASSOCIATION (U. S. A.)

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This brief is filed by permission of the Court.

### I

### THE T. W. O. C. WAS NOT DESIGNATED AS BARGAINING REPRESENTATIVE BY A MAJORITY OF RESPONDENT'S EMPLOYEES.

(a) Respondent does not contend (Brief pp. 34-46) "that the T. W. O. C. had no authority under its Rules and Regulations (Board's Exhibit 33) and the contract between the C. I. O. and the United Textile Workers of America (Board's Exhibit 34) . . . to accept Respondent's employees as members prior to formation of a local union affiliated with the T. W. O. C."

Respondent recognizes that the organizing Committee by resolution could have modified its established Rules and Regulations so as to accept Respondent's employees as direct members under any conditions prescribed; but failing proof of such action, Respondent contends there is no evidence whatever establishing authority in Salerno to construe the contract and Rules and Regulations as he chose and without authorization therein, to take Bradford employees directly into the Organizing Committee.

Salerno was not the T. W. O. C.; at most, he was only an agent of the Organizing Committee without power to waive or vary the membership scheme established by the Agreement creating it and its Rules and Regulations.

For a discussion of Salerno's authority to represent T. W. O. C. see main brief pp. 45-46.

Respondent agrees that Sec. 9 (a) does not, of itself, require membership in a labor organization, but speaks only of designation or selection of a representative, and that Section 9 (c) permits employees whether or not members of a labor organization to select a representative by ballot.

Respondent's position is this:

Assume a unit of 50 employees; assume that labor organizers during one evening obtain 26 signed cards authorizing X labor organization to act as their representative for collective bargaining; that there is no further participation in any shape, manner or form by the employees; that the next morning a stranger presents himself to the general manager claiming to be the representative of X labor organization saying that he has cards signed by a majority of the manager's employees designating X organization as their representative for collective bargaining and demanding that the manager bargain with him; that the general manager demands to see his credentials—the cards; that the pretended representative declines to show them, saying they are a con-

fidential matter between him and the signing employees, but that he will refer the cards to a named labor conciliator for comparison with Respondent's pay roll (not in the presence of the manager) and have such conciliator report to the manager whether the 26 signed cards were all signed by employees of the manager. The manager declines to accept this suggestion saying that he is entitled to check the cards and determine whether the claims are well founded. Negotiations stop there. Is the manager within his rights in requiring that proof be submitted to him of the representative's authorization? Has he by refusal to accept a labor conciliator's findings refused to bargain collectively?

Hasn't he the right both for his own protection and the protection of his employees, majority and minority alike, to have direct proof before making a contract binding him and all his employees for, say, a year as to wages, hours, etc., that the person in fact represents the X labor organization and that it in turn represents the majority.

Thereafter the organizer presents a contract containing paragraphs identical with those in the contract tendered Respondent by Salerno on April 16, 1937 (Respondent's brief p. 59; R-313) and demands that the manager sign a contract containing those provisions.

Respondent contends that such supposed representative, in presenting and demanding a signed contract whereby the employer agrees to recognize X labor organization only for its members and agrees not to bargain with any other agency, group, or union for the purpose of collective bargaining in his plant, would not be acting within the scope of his authorization as representative of the majority for collective bargaining and that in so doing he would be faithless to the trust reposed in him by the majority. Respondent believes that such a contract would violate the spirit and intent of the Act.

(b) The Board has always argued that the cards effected

both membership and authority to bargain, and the Examiner so found (R-595); now, for the first time, it abandons that position and argues that membership is immaterial and that designation is the only issue. If the signers of these cards "joined" the "National Union" of the T. W. O. C., for membership in which they were "directly" eligible (Board's Main Brief pp. 33-35), counsel for Respondent wonders what would have been said to Messrs. Nelson, Schofield and a half dozen other signers if they had presented themselves in a body at some meeting of the Council of the T. W. O. C. claiming the right to participation in the Council deliberations.[1]

If this Court finds the blue and white cards equivalent, it must find that a signer intended two things:

(a) membership in the T. W. O. C.;

(b) authorization for collective bargaining.

Salerno asserts (R-287) that signers of these cards became immediately members in good standing of the T. W. O. C. and were still members in good standing in July, 1937, although they had paid neither dues nor initiation fees, and that a Charter or a Local was unnecessary in order that members be taken into the T. W. O. C.

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[1]Section 10 (e) of the Act applies to the courts which the Board "shall have power to petition" and not the Supreme Court.

Furthermore the effect of these cards was briefed and argued before the Circuit Court which found that there was not substantial evidence that the T. W. O. C. had a majority of the employees signed up, 106 F. (2d) 123.

In the Board's petition for certiorari (p. 17) the Board alleges that the so-called application cards sought membership in the affiliated union of the CIO (Board's Exhibit 15) and contends that the Circuit Court's holding that T. W. O. C. did not represent a majority is contrary to the undisputed evidence based on signed cards for union membership.

In its main brief the Board again discusses the two types of cards and their effect (pp. 32-35), and alleges that it was the National Union which was joined by the employees who signed certain cards.

It would therefore appear that the Board is not now in a position to make the contention it does.

There is no evidence supporting this assertion, but, as argued in Respondent's brief (pp. 34-44) the Contract and Rules and Regulations of the T. W. O. C. authorize no such procedure and refute Salerno's assertion.

If this Court finds that signers did not become members of the T. W. O. C., then the further question arises whether the signers intended that their actions should be separable.

Did they intend without membership in the T. W. O. C., without self-organization, without participation (Act, Sec. 2 (5)), and without knowledge of what was being done, to authorize a representative of the T. W. O. C. in their behalf to make a binding contract with Bradford determining such matters as rates of pay, wages, hours and other conditions of employment for such length of time as such representative of the T. W. O. C. and the employer agreed upon?

(c). For the first time the Board (Reply Brief, p. 5), raises the point that Respondent has continually throughout the proceedings "acquiesced" in the "consideration of the white cards, and a compiled list including both them and the membership cards" as "proper proof of the allegations of the complaint (R-11) that the T. W. O. C. had been designated by a majority of the employees."

Nothing could be further from the fact. The Board's Exhibit 30 (R-534-552) was a compilation of the names appearing upon both types of cards (*white* Board's Ex. 15; *blue* Board's Ex. 16 (R-77) Res. Main Brief pp. 48, 49), introduced in lieu of the cards themselves. Respondent's counsel, as well as Intervener's counsel, examined the cards to check the accuracy of the list. The Record reads (R-340):

> "Mr. Schneider: The respondent has checked the names on this list against the original application cards similar to Board's Exhibit Nos. 15 and 16. And it is agreed that this list, which has been marked Board's Exhibit No. 30 for identification, is a true and correct

list of the names appearing on those cards, and that the total number of names on the list and the total number of original cards are 482. Is that correct?

Mr. Slade: You might say checked by respondent's counsel.

Mr. Schneider: Checked by counsel for the respondent.

Mr. Ferguson: In the presence of the intervener.

Mr. Schneider: Yes. I understand that counsel for the intervener also agrees that this is a true and correct list and represents 482 names.

Mr. Ferguson: That is correct.

Trial Examiner Webb: Admitted.

(Thereupon the document above referred to was marked as 'Board's Exhibit No. 30, Witness Mulvey'.)"

Miss Mulvey, Board's witness, testified as follows (R-333):

"Q. 9. I show you a list of names, Miss Mulvey, and ask you what it is (handing paper afterwards marked Board's Exhibit 30 for identification)? A. That is a list of the signed pledge cards signed by the workers in the Bradford Dyeing Association.

Mr. Schneider: I ask that that be marked for identification.

(Thereupon the document above referred to was marked as 'Board's Exhibit No. 30, for identification, Witness Mulvey'.)"

The Board contends (R. B.-5) that what appear as headings of the Exhibit (R-534) have been admitted by Respondent to be "proper proof of the allegations of the complaint (R-11) that the T. W. O. C. has been designated by a majority of employees."

These headings are as follows:

"List of employees who signed C. I. O. Cards
(Board Exhibits 15 & 16) on or before April 10, 1937
Total 481 Sent to Boston"

"List of respondent's employees who signed 'Textile Workers' Cards before April 10, 1937 Total 481"

An examination of this Exhibit will disclose that the two "headings" quoted both appear on the first page of the Exhibit, written in longhand, partly in ink and partly in pencil; one at the top of the page, the other at the bottom.

The proper method of captioning the list was the subject of considerable discussion. (R-425, the Trial Examiner said:

> "I wish these lists had been captioned as to what they are. Of course, we can identify them by the number of the exhibit. It is too late now. But they should have stated at the top, 'List of so-and-so', just what it is. It would be much more convenient."

The question of Exhibit No. 39 (R-561) was also discussed, the Trial Examiner saying (R-426):

> "As I understand it, this list (Respondent's Exhibit No. 39) is submitted in lieu of the cards?"

and also that it purported to be a transcript of the cards as to names.

There was considerable discussion as to the dates when cards were signed (R-426, 427, 428).

The list (Exhibit 30) comprises exactly what the "headings" state, viz:

(a) a list of all employees who signed C. I. O. cards—that is the white cards;

(b) a list of all employees who signed Textile Workers cards—that is the blue cards.

It is clear from the foregoing that Exhibit 30 was not introduced as nor understood by counsel to be "proper proof" of the allegations of the complaint as to T. W. O. C. designation, nor was it admitted by the Examiner for that purpose.[2]

[2]Respondent's counsel agrees with the contention of the Board's counsel that the Federation card (Respondent's Exhibit 39) (R-561) is substantially equivalent to the C. I. O. white card (Board's Exhibit 15) so far as membership in either organization goes. The signers of the Federation cards later performed their agreement by joining, paying initiation fees and dues, by organizing, and becoming an active labor unit; whereas, the signers of the C. I. O. white cards did nothing.

## II

## RESPONDENT DID NOT REFUSE TO BARGAIN COLLECTIVELY.

This is discussed in our main brief, (pp. 54-62) but since the Board raises the issue it seems necessary briefly to re-state Respondent's position. Summersby believed in the principles outlined in the Wagner Act as to collective bargaining (R-452). On April 9th he had given bargaining rights to the Employees' Federation (R-226-228, 457). April 13th Summersby, at Bernard's solicitation, visited Salerno at his hotel when the latter first demanded bargaining (R-455).

When Salerno said to Summersby they should "get together and sign a contract" (R-454), Summersby replied he didn't see how he could legally do anything, but he would be glad to discuss the matter with his attorney and see what his legal rights were (R-455). Summersby asked for proof of Salerno's authority: "Where are your cards?" Where is your proof?" (R-455). Salerno refused to produce proof except through the intervention of a third person (R-303, 304).

Bernard told Summersby that same evening that Salerno had said it was not a matter of wages, that the wages were all right, but a matter of organization (R-456). Bernard also said that he was asking Dr. Myers of the Board to let him handle the matter and inquired, "Couldn't we arrange it so that a vote could be taken at your plant?" (R-456). Summersby replied that the selection of a union at Bradford was a matter for his employees. "It matters not to me," said Summersby, "what union *of* employees of Bradford Dyeing Association are in. That is something purely for their decision; I have nothing to do with it" (R-456).

In this connection the Court's attention is called to Section 9 (c) of the Act, which provides that the Board "may take a secret ballot of employees;" it does not provide that a

labor conciliator may take such ballot or that the Board may delegate the taking of the ballot to a labor conciliator.

On April 16th when Summersby expected to meet only Bernard, (as Bernard expressed it "away from the influence of any of the C. I. O. organizers" (R-454-457). Salerno appeared and, for the first time, presented a written contract (R-457). At this conference Salerno did not ask for sole bargaining rights, but said in substance, "Can't we get together and sign up on this and reach a compromise on the boys?" (R-457). After discussion Summersby said he would take the contract, discuss it with his lawyer, see what he could legally do about signing it, and report to Salerno the next week (R-458).[a] Summersby asked that the boys be brought in for hearing and Bernard replied, "We will let that matter rest" (R-458), (R-102).

Summersby discussed the matter with his lawyer and on the following Friday, April 23 (after reported absence through Thursday of Salerno (R-458)), went to Providence for a further conference with Salerno and then learned that the latter had preferred charges to the Board on April 22 (R-458-460). He did not request an election but asked for "condemnation" of the Federation (R-312). It thus appears

[a] That part of Summersby's testimony which relates to the meeting in Westerly when Summersby took the contract and said he would confer with his lawyer is denied by Salerno (R-307), but that Salerno's memory was faulty on this point is established, both by Summersby's subsequent acts and also by the testimony of Nelson (R-170).

When Nelson went to Providence to meet Bernard and Salerno at the latter's office, he learned that Bernard was arranging an appointment with Summersby on the following day (R-170); this dovetails with Summerby's testimony that he intended to go to Providence on Tuesday, April 20 (R-458) but that he did not go because he learned through his attorneys that Salerno was going to New York and would not be back until Thursday night, the 22nd of April (R-458).

It was on Thursday, the 22nd of April, that counsel learned through Bernard that Salerno had made complaint to the Board.

Salerno states that at the Westerly conference on April 16, he did not "ask for sole bargaining privileges for all employees" (R-312; Q-X 110).

that Salerno, not Summersby, broke off negotiations; also, that Salerno did not really demand collective bargaining from Summersby, but when he became specific presented the contract requesting recognition of the T. W. O. C. "for its members only" (R-313).

Summersby's attitude towards the matter is expressed in a letter dated May 5th, which was delivered to Dr. Myers, Regional Director of the National Labor Relations Board, in Boston, Massachusetts, on May 6th (R-630-1) in which Summersby stated that his corporation preferred that the Board would make its own decision as to "the propriety of a secret ballot" and that it would, without prejudice to its rights, render all reasonable assistance, if the Board decided to investigate, and would endeavor in all respect to comply with the Act, pending decision as to its applicability.

In concluding this point, Respondent contends that Salerno never made an offer to bargain either in accordance with his authority or the terms of the Act. Obviously there cannot be a valid refusal to bargain without a valid offer.

## III

## THERE WAS AN ATTEMPT TO PROMOTE A SIT-DOWN STRIKE.

The Board argues that "there is no evidence whatever connecting Rhodes, the employee who urged his co-workers to 'sit down,' with the T. W. O. C. or with the alleged efforts of Nelson to promote a sit-down strike" and that the evidence does not implicate Schofield (Bd's R. B. p. 11).

It appears that Rhodes came to work on April 8th, the morning in question, at 7 A. M.; he didn't start his machine, but "immediately walked up and down the alley, waving his hand, and saying, 'Sit down! Sit down! This is a strike!'" (R-424, 425).

Further testimony concerning Rhodes' activities and participation was, over the objection of Respondent's counsel, excluded by the Examiner on motion of the Board's trial attorney (R-423, 424). Whether Rhodes' testimony would or would not have been illuminating is matter for speculation. The Board alone is responsible for lack of further testimony from him. Rhodes was not discharged (R-357).

It does appear, however, that at the time of the alleged effort to stage the sit-down strike both Nelson and Schofield were on the T. W. O. C. payroll (R-151, 87, 314, 315), Nelson receiving $24.00 a week, while Schofield was receiving less (R-315); that accompanying Schofield and Nelson at the time was a C. I. O. man (R-418); that Rhodes' activities inside the plant and Nelson's activities outside were coincidental (R-350, 351, 353, 354, 356, 416, 417, 418, 419, 420, 421, 422, 423, 424). There is also evidence that there had been much talk in Westerly as to whether there was to be a sit-down strike at Bradford and that rumors were broadcast that the C. I. O. was attempting a sit-down strike (R-479).[4]

## IV

## NELSON'S LAY-OFF FOR TWO WEEKS WAS JUSTIFIED

The sole question is: Was Nelson's conduct such as would have justified his lay-off for two weeks as a disciplinary measure irrespective of his T. W. O. C. activities?

Respondent contends that the association of an employee with a labor organization neither renders him immune from

[4] In connection with the alleged attempted sit-down strike the Court's attention is particularly called to the following: Respondent's Main Brief pp. 84-90; Cruickshank (R-350, 351), Paolino (R-353, 354), Pawson (R-356, 359), Guertin (R-416-417), Ballato (R-418-420), Ventry (R-421, 422), King (R-424), Nelson (R153, 154).

proper discipline nor gives him any greater right to infringe rules or neglect his work than would be accorded the employee not so associated.

Briefly to review the facts which are more fully set forth in Respondent's Main Brief pp. 74-84:

On April 2 Nelson left his work and interrupted a conversation in another part of the plant, which Summersby, the President, was having with Schofield over jiggers' pay (R-133, 157).

Later that same day Nelson left his work and went down to see Schofield. Upon being told that Schofield had gone to Summersby's office, Nelson left the plant, went through the outside office into the President's private office and interrupted a conversation which Summersby was having with jiggers (R-134).

After being sent out he got ready to go home and was told Summersby wanted to see him. He admitted to Summersby that he had been in the plant the night before; when asked if he was in the habit of going to the Office without being summoned, replied that he was not and admitted he knew it was "against the rules to be in the plant at night . . . without first obtaining permission" (R-136); that he had gone back to the plant on Thursday night after he had finished his day's work to get some signed application cards that had been left for him; that he got these cards when "Mr. Rood came up and put me out." (R-137) This was a deliberate act and a deliberate violation of respondent's rules, in which Nelson suggests the watchman connived (*infra*).

Saturday morning he went to the plant a little after 6:00 o'clock; opening time was 7:00 o'clock (R-138) and his average arriving hour was between quarter of seven and seven (R-138) (R-159). After seven he talked to various employees when Dudley, the carpenter foreman, "asked me when I intended to start work" (R-138).

When in Summersby's office late that afternoon, Summersby asked him how he got into the plant on Thursday night; "I told him I walked in." (Q. 91).

> "He says, 'How did you get past the watchman?' I said 'How do you know that the watchman hasn't signed with us?'" (R-140; Q. 91).

After a discussion as to his starting work that morning, he states Summersby then "told me to take two weeks off and cool off, that I was too excited about the whole thing. I told him I would be all cooled off Monday morning, and I was ready to go back to work Monday morning" (R-140, 141; Q. 93).

> "He said (meaning Mr. Summersby) 'You take the two weeks off and then come back and see Mr. Pierce'." (R-141; R-142).

He did not go back at the end of two weeks; he was told on April 16 (the day before he was to report to Mr. Pierce) by Salerno and Bernard that Summersby had told them he wouldn't take either him or Schofield back (R-142).

There is no evidence that Summersby authorized Salerno or Bernard to convey this information.

At the time of his lay-off he was earning $22.00 a week (R-151); after his lay-off he received either $24.00 or $25.00 a week for 4 weeks from the C. I. O. (R-151). Was this the real reason for his not going back on April 17th?

He testified further that when he was distributing these cards in the plant during working hours different fellows started to knock off work from different points throughout the whole mill that he had given cards to. "Some of them probably asked me what the C. I. O. was, and I told them what the C. I. O. represented" (R-153).

It is obvious that he had no right on April 3 to be in the plant around 6:00 when his work did not start until 7:00.

He testified after work started April 3 to talking to two employees who wanted to know what had happened at the committee meeting the night before (R-159). Although he was a carpenter's helper and had left a job with a carpenter named Jim Hermanson on Friday afternoon, he had not gone back to this job on Saturday morning until sent there by Dudley (R-160, 404).

When questioned as to the reasons given by Mr. Summersby for his lay-off he replies:

> ". . . that it would react on the plant and there would be a question of his authority" (R-162).

It is important to notice at this point, although Nelson was given opportunity here and on many other occasions both in direct and cross examination, nowhere does he say that he was laid off because of his C. I. O. activities. From all that appears he accepts his lay-off as justified.

Summersby gave Nelson a friendly and fatherly warning in the afternoon of April 2 (R-449); yet, despite that warning, the very next morning Nelson clearly infringed the plant rule against being on the premises outside working hours, neglected his work, and interfered with the work of others. If all the carpenters in the plant had conducted themselves on April 2 and 3 in a similar manner there would have been a sorry state of affairs in the plant. Nelson deserved discipline both for his own good and the morale of the plant.

There is not a scintilla of evidence from any witness that the reason for Nelson's discharge was C. I. O. activities. On the contrary, Summersby told him he had not been discharged for that on two or three occasions. The Board's finding is based on inferences unwarranted by the evidence.

Respondent contends that the lay-off of Nelson was not a discrimination in regard to tenure of his employment or any term of his employment for the purpose of discouraging membership in T. W. O. C. Sec. 8 (3).[5]

## V

## RESPONDENT DID NOT DOMINATE FORMATION OR ADMINISTRATION OF FEDERATION.

There was no domination of the formation or organization of the Federation by respondent. The Record shows that DeFanti, an old A. F. of L. organizer and officer "who took it on ourselves to organize" in 1916. (R-432) and former president of the Quarry Workers' Union (R-433) and past president of the Bradford Citizens' Club (R-445), who encouraged the employees of Bradford to organize and strike in 1929 (R-441, 431, 432, 433) (which strike nearly ruined him (R-434)), did not think the C. I. O. a suitable organization for the Bradford employees (R-431). He was organizer of the B.D.A. Federation (R-430) and gave the impression (as a means of organizing the Federation) that Summersby would not recognize the C. I. O. (R-430, 431, 436). He approached Summersby on April 2 (R-474) the first day Summersby learned from Schofield that the C. I. O. was organizing (R-447).

[5]Nelson was a carpenter's helper to whom on April 3 work had already been assigned. He was supposed to be with his carpenter and his boss, Dudley, did not figure he had to tell Nelson, the helper, to go with the carpenter (R-404). Dudley describes the existing situation that morning when he says (R-402):

"I told him (Nelson) he had been talking with the different ones and keeping them from starting."

See also X-Q 78 (R-403) and Q-87 (R-404) where Dudley says:

"He was wasting time all the time I saw him until half-past seven."

The right of self-organization under Sec. 7 of the Act does not imply that an employee on the company's time may leave his work, interrupt the work of other employees, travel about the plant at will, visit the plant at night in violation of rules, go to the president's office without permission, etc., etc., all of which, and more, Nelson did.

It is significant that if Summersby was at all interested in the efforts of employees to form or organize a local union, Summersby certainly did not exhibit any eagerness at that time for he told DeFanti he was busy and had just returned from New York and could not meet with him and asked if he would let it go over until four days later, April 6th (R-474).

On that day, April 6, it appeared that at the meeting which Summersby supposed was wholly for grievances in his office (R-171, 185, 474) DeFanti was present and membership cards and circulars, which were wrapped up in brown paper (R-180) and brought to Mr. Summersby's office, were opened up and distributed by DeFanti (R-183) after Summersby had left the office (R-174, 180, 181, 183).

Ashworth, whom Summersby never knew before (R-472, 183, 174) was elected temporary president.

It is submitted that the evidence substantially indicates Summersby played no part in the conception or formation of the B.D.A. Federation and that organization proceedings ripened because of DeFanti's influence over the employees—the residents of Bradford looked up to him (R-445).

The employees determined to organize to keep the C. I. O. out of the plant and keep the working conditions O.K. as they were (R-228, 229).

Summersby stated he would grant them the same privileges he would grant to any union (R-475) and if they were organized 51% he would under the law have to give them bargaining rights.

Harwick, the Board's witness, stated no officer selected him (R-180) for the committee and Azzinaro stated he went to the meeting in Summersby's office for grievances as to jiggers and not for union matters (R 185).

It is submitted that these two meetings in Summersby's

office were, so far as Summersby's appearance was concerned, with reference to grievances and the meeting in the evening at which Summersby was not present at 5 P. M. was conducted there because Summersby was going home and told them to use his office and make themselves comfortable as the grey room office they had asked permission to use was not suitable (R-475).

We submit there is no substantial evidence that Summersby dominated the formation of the B.D.A. Federation and there is no evidence submitted that respondent supplied cards, literature or financial aid in any form to the formation or organization of the B.D.A. Federation.

By April 9th the B.D.A. Federation had enrolled a majority of employees, presented evidence to respondent and were granted bargaining rights (R-225, 228, 259).

Potter stated they affiliated with the Associated Workers and became Local 16 to assure employees it was not an employer fostered union (R-234).

A contract was being drawn at the time of the hearing (R-229, 264) and Ashworth testified that if the management should break that contract, they would appeal to the N. L. R. B. (R-264).

There is no evidence whatever of domination of formation or administration of the second union—known as Local Union No. Sixteen of Bradford, etc., constituting a Branch of the Associated Workers of Printing, Finishing & Allied Industries to be known as the B.D.A. Employees' Federation Branch of the Associated Workers of Printing, Finishing & Allied Industries.

(See Resp. Main Brief, pp. 14-33.)

## VI

## RESPONDENT SHOULD NOT BE REQUIRED TO BARGAIN WITH THE T. W. O. C.

Counsel for the Board contends that there is an irrefutable inference that any falling away in the alleged membership of the CIO was solely due to Respondent's unfair labor practice in refusing to bargain (if such is found) and not to the exercise of the free will of the employees who changed their affiliation and that in order to restore the *status quo* the bargaining agent, if originally selected by the majority, must be restored regardless of the fact that this Court may be satisfied that the CIO, because of the falling away, no longer represents a majority. It seems to Respondent's counsel that the Act was designed not for the benefit of any particular labor organization or any particular employer, but to enable employees to designate or select such representatives from time to time for the purposes of collective bargaining as they saw fit. Employees surely have a right to change their minds and to change their affiliations and when it is made to appear to the Court that such has occurred, the Court should take notice. In the instant case, even assuming the existence of the T. W. O. C., an order authorizing respondent to recognize the T. W. O. C. as bargaining agent would result, on the state of the record, in an authorization to the T. W. O. C. representing a small unorganized minority to bargain collectively for the organized majority. All that has happened in this case could have been avoided if the Board under Section 9(b) had taken a secret ballot of Respondent's employees, thus determining their representative. Counsel for the Respondent is unable to understand why that course was not taken in the beginning unless Salerno was fearful of the result.

As Respondent's counsel understands the Board's position, it asks this Court to overrule the cases of *National Licorice Company* v. *National Labor Relations Board*, No. 272, this Term, decided March 4, 1940 and *National Labor Relations Board* v. *American Manufacturing Company*, No. 664, this Term, decided March 11, 1940, in both of which the Court, feeling doubt that the union was at the time of decision the choice of the employees, held that the order requiring collective bargaining be conditioned upon the Board's ascertaining by an election whether the union was still the choice of the majority.

The remarks of the Circuit Court in the Hamilton-Brown case are pertinent.

> ". . . We are of the view that it would be arbitrary and unfair, and not in keeping with either the letter or the spirit of the Act, to require the employer and its employees to conduct their negotiations through an agency not fairly representing a majority of the employees. In the face of the record as it stands, it can not be assumed that the Union is now the accredited representative of the employees, but the showing made, and it stands without dispute, is at least sufficient to require investigation and to cause a court of equity to inquire whether an order requiring both the employer and the employees to recognize the Union as the bargaining agency should be enforced in the face of circumstances making such enforcement unwise, if not illegal." (104 Fed. (2d) 56.)

> ". . . Having in mind that it is the fundemental policy of the Act to permit employees freely to choose their representatives, it follows that the employees have a right to change their choice, and when that fact has been brought sharply to the attention of the Board, as in this case, it was, we think, the duty of the Board to investigate the claim." (104 Fed. (2d) 55.)

The decree of the Circuit Court vacating the Board's order that Respondent should bargain collectively with the T. W. O. C. as the exclusive representative of Respondent's employees in the appropriate unit should be sustained.[6]

[6] *Texas & New Orleans Railroad Company et al., petitioners, v. Brotherhood of Railway & Steamship Clerks et al.*, 281 U. S. 547, relied on by the Board is not apposite. District Court granted a temporary injunction enjoining the Railroad Company from coercing its employees in the matter of their organization and designation of representatives. Thereafter, contempt proceedings were brought against the Company to purge themselves of which the Company was ordered to do certain things, 24 Fed. (2d) 426. Temporary injunction was made permanent, 25 Fed. (2d) 873. Motion to vacate the order in the contempt proceeding was denied, 25 Fed. (2d) 876. The C. C. A. of the 5th Circuit affirmed the granting of the injunction and the action of the District Court in imposing the conditions it did for purging of contempt, 33 Fed. (2d) 13. On certiorari to this Court the decree was upheld.

# APPENDIX

## SMOKING

On the question of lay-offs and discharges for smoking, in addition to Schofield, these citations were furnished the Court by counsel at the argument on March 27 and are repeated here for the Court's convenience.

*R-145*

Nelson testified that he knew of a couple of instances in the shop where a couple of men had been fired for smoking but got back in a week's time.

*R-147*

Nelson testified with reference to smoking that it went on in the locker rooms, the discontinued refrigerator plant, on the roofs, in the boiler room, and in places where they were "not exactly out in the open".

*R-166*

Summersby found Jack Silvia, an electrician, smoking on the loading platform and fired him.

*R-383, 384*

Hopwood testified that he caught Schofield smoking 3 times, and that he caught employees named Wolstencroft, Smith and Roberts smoking; that Smith was laid off, and Wolstencrof discharged.

*R-124*

Schofield testified that other men besides himself who had been caught smoking were laid off for two weeks; he knew about quite a few during his 6 years of employment.

*R-273, 274*

Ashworth testified to the discharge of one Terranova for smoking and his reinstatement at the instance of the grievance committee.

The question arose at the argument whether Respondent had delayed the ordinary progress of this matter. The chronology follows:

(a) Charges were lodged with the Regional Director April 22, 1937 (R-312);

(b) Complaint issued June 30, 1937 (R-12);

(c) Hearings held before the Examiner July 12 to July 16, 1937 (R 24-R 586);

(d) Trial Examiner's Report dated October 16, 1937 (R-602);

(e) Decision of the Board rendered December 22, 1937 (R-675);

(f) Board's petition for enforcement filed in the Circuit Court of Appeals April 4, 1937 (R-675);

(g) Thereafter Respondent petitioned Court for leave to adduce additional evidence with regard to Nelson (R-676);

(h) Court issued order granting leave on April 14, 1938 (R-676);

(i) Thereafter attorneys for the Board and Respondent stipulated that in lieu of further hearing and testimony certain affidavits would be made part of the proceedings and of the Record with the force and effect of testimony (R-676);

(j) After filing of such affidavits the Board made its supplemental findings of fact on August 30, 1938 (R-677);

(k) Case argued in the Circuit Court of Appeals, First Circuit, on April 11, 1939;

(l) Court handed down opinion August 2, 1939;

(m) The Board filed petition for re-hearing which was denied September 13, 1939;

(n) Board filed its petition for Certiorari December 13, 1939.

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IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

*v.*

BRADFORD DYEING ASSOCIATION
(U. S. A.)
*Respondent.*

No. 588

## RESPONDENT'S MOTION FOR LEAVE TO FILE SUGGESTION AND AFFIDAVIT

Now comes the respondent, Bradford Dyeing Association (U. S. A.), by its attorney, Harry Parsons Cross, and moves:

1. For leave to suggest to the Court the dissolution of the Textile Workers Organizing Committee, the continued existence of which organization would appear to be unnecessary to give effect to the order of the National Labor Relations Board from which the present cause arises;

2. For leave to file, as an exhibit, in support of this suggestion, the affidavit of Harry Parsons Cross

respecting his information and the sources thereof concerning the dissolution of the Textile Workers Organizing Committee, together with the original documents attached to such affidavit, i. e.:

(a) The original carbon copy of a letter dated March 15, 1940 from Harry Parsons Cross to Mr. Emil Rieve, General President, T. W. U. of A.;

(b) The original of a letter dated March 18, 1940 from Emil Rieve, General President, to Harry Parsons Cross.

(c) A paper bound volume of two hundred fifteen numbered pages, the title page of which reads: "Proceedings First Constitutional Convention Textile Workers Union of America (to which are attached the convention proceedings of the Textile Workers Organizing Committee and of the United Textile Workers of America) May 15-19, 1939, Scottish Rite Temple, Philadelphia, Pa."

Respectfully submitted,

HARRY PARSONS CROSS,
*Counsel for Respondent.*

Copy of this motion and supporting affdavit received this 2nd day of April, 1940.

CHARLES FAHY,
*Attorney, National Labor Relations Board.*

# SUPREME COURT OF THE UNITED STATES.

No. 588.—October Term, 1939.

National Labor Relations Board, Petitioner, *vs.* Bradford Dyeing Association (U. S. A.) } On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 20, 1940.]

Mr. Justice Black delivered the opinion of the Court.

The Circuit Court of Appeals declined to decree effective enforcement of an order of the National Labor Relations Board upon the ground that the Board's order, in material respects, rested upon findings that were not supported by substantial evidence.

In its petition for certiorari, the Board took sharp issue with the Court of Appeals, asserting that some findings upset by the court were supported not merely by substantial but by "uncontradicted" and "undisputed evidence." The petition also pointed out that the court's opinion was "ambiguous and inconclusive" and "left unclear the court's holding as to whether the Board had jurisdiction." Our inspection of the court's opinion and decree disclosed that the court deemed the Board to be wholly lacking in jurisdiction. Nevertheless, the Board was ordered to proceed in accordance with the opinion which concluded with the indecisive statement that "if the case should not be dismissed for lack of jurisdiction" a large part, but apparently not all, of the Board's order should be vacated. The court's decree did not direct enforcement even of those parts of the Board's order not expressly vacated. The Board's petition further pointed out that its motion for rehearing in order to clarify the question of its jurisdiction and to establish the status of "those portions of the Board's order which the court neither vacated nor enforced" was denied without explanation. Because the Labor Board's petition in challenging the action of the Court of Appeals thus raised questions of grave public importance affecting the ad-

ministration of the National Labor Relations Act and judicial review as provided in the Act, we granted certiorari.[1]

This proceeding was initiated upon charges filed by the Textile Workers Organizing Committee of the C.I.O. Thereupon, the Labor Board served a complaint and notice of hearing on the Bradford Dyeing Association (U. S. A.), respondent here.

In the complaint, it was alleged that respondent in order to discourage membership in the C.I.O., had discharged and refused to reinstate its employees, Edward Nelson and Percy Schofield, because of their affiliation and activities in the Textile Workers Organizing Committee of the C.I.O., (T.W.O.C.); respondent had dominated and supported the Bradford Dyeing Association Employees' Federation, a labor organization, and had refused to bargain collectively with its employees through the T.W.O.C. after a majority had selected it as their bargaining representative.

The Board's jurisdiction was unsuccessfully challenged on the ground that respondent's business involved no activities in or affecting interstate commerce within the meaning of the Act. And, answering, respondent alleged that Schofield was discharged because he smoked during working hours; "that . . . Nelson was not discharged, that he was insubordinate and defiant, that he did not work and refused to work during the times when he was supposed to be working, that he was on the premises during hours when he was not supposed to be on the premises of respondent and was taking up the time of other employees who were supposed to be working during such time, that . . . Nelson went upon a vaction and has not returned to work after such vacation nor made any statement of his readiness to return to work or made any request that he be put to work again"; that respondent had not dominated or coerced the Federation; and that any labor disputes at its plant were attributable to the conduct of the T.W.O.C.

The Federation was allowed to intervene in the extensive hearing held by the Board.

After this hearing, the Board found that "a labor dispute" in respondent's plant would widely affect "the flow of commodities in interstate commerce", with consequent jurisdiction in the Board, and that the charges of the complaint had been substantiated.

The Board accordingly ordered respondent to cease and desist from (1), interfering, or coercing its employees in the exercise of

[1] — U. S. —; cf. Labor Board v. Waterman Steamship Co., — U. S. —.

their rights to self-organization; (2), dominating and interfering with the Federation or any other labor organization; (3) discouraging membership in the T.W.O.C.; (4), refusing to bargain collectively with the T.W.O.C.; and (5), ordered respondent affirmatively to offer reemployment to Schofield and Nelson and to make them whole, to withdraw all recognition from and completely disestablish the Federation, to bargain collectively with its employees through T.W.O.C., and to post the usual notices throughout its plant stating that the company would cease its unlawful and unfair labor practices and would treat its agreement with the Federation as of no effect.

In its final decree the Circuit Court of Appeals directed that "until a new election has taken place by order of the Board, and the employees have expressed their preference as to what group or body shall represent them in any labor dispute between them and the respondent, the order of the Board except as to paragraphs (1), (2), and (3) of the cease and desist portion of the order, and the entire paragraph ordering affirmative action, shall be vacated, the Board then to proceed in accordance with the opinion passed down this day." As phrased, the decree is not clear but apparently the court vacated subdivisions (4) and (5) of the Board's order. The court's opinion did make clear that under its decree the company was left free to bargain collectively with the Federation and to decline to bargain with the T.W.O.C. Discharges of Schofield and Nelson were approved and the company was released from publishing notices which, if warranted, were "essential if the employees were to feel free to exercise their rights without incurring the Company's disfavor."[2] Although those portions of the Board's order prohibiting the company's interfering with its employees' union affiliations were not expressly set aside or modified, neither were they ordered enforced.[3] Thus the court's decree gave the Board's order no effect at all.

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[2] Labor Board *v.* The Falk Corp., — U. S. —, —.

[3] Section 10(e) of the National Labor Relations Act gives the Board power to petition any Circuit Court of Appeals of the United States for the enforcement of its order; grants these courts exclusive jurisdiction and provides that "Upon . . . [the Board's filing a transcript of the entire record in the proceeding], the court shall cause notice thereof to be served upon such persons, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to . . . make and enter upon the pleading, testimony, and proceeding set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." 49 Stat. 449, 454.

It did not explicitly so decree, but the Court of Appeals evidently was of the view that evidence was lacking upon which the Board could have found that respondent's business was in or affected interstate commerce. The court expressly found a lack of evidence to support the Board's conclusion that Schofield and Nelson were discharged for union activities and stated its belief that Schofield was discharged for smoking in the plant and Nelson for insubordination, and that "the finding by the Board that the T.W.O.C. had a majority of the employees of the respondent signed up even to become members of a union under that name is without substantial evidence on which to rest."

Without specifically passing upon the Board's finding that respondent had unlawfully dominated the Federation, the opinion of the court stated, ". . . *assuming that the president or officers of the respondent influenced its employees to join the Federation, so-called,* it does not appear by clear and substantial evidence that a majority of the employees ever joined, or indicated an intent to join, the T.W.O.C., . . . ." (Italics supplied.) Since the court did not vacate that part of the Board's order directing the company to discontinue domination of the Federation we might infer that the court accepted the Board's finding that the Federation had been so dominated. But this inference is opposed by the court's action in vacating the order of disestablishment. The uncertainty in which the court has left the questions of jurisdiction and company domination of the Federation makes necessary a review of the evidence on both, along with other evidence which we think amply demonstrates the justification for the Board's order in every respect.

*First. As to Jurisdiction.*

A major portion of the opinion of the court below is devoted to its expression of doubts about the Board's jurisdiction, i. e., "there is no substantial evidence to warrant a finding that the transportation of these materials by the respondent was ever in interstate commerce;" "there is also lacking substantial evidence that forty per cent of the supplies consisting of chemical and dyes, which were contracted for in Rhode Island and delivered by the sellers to the respondent's plant in Bradford, were transported by the respondent in interstate commerce, or that they were used by the respondent except at Bradford, though the Board assumed without evidence

hat they were shipped by the respondent in interstate commerce, ut its assumption lacks substantial evidence on which to rest, that ould compel this Court to accept it as a fact;" "The respondent, cording to uncontroverted testimony, neither sells, transports, nor rranges for transportation of the goods into or out of Rhode Island interstate commerce which is done in each instance by the cus- mer, . . . . ;" and "The Board apparently assumed that the spondent transported goods to its plant and from it, which the ncontroverted evidence disclosed were not the facts." Referring waste products which respondent sells in interstate commerce, the urt noted that they did not "exceed one per cent of the total ods processed" and said that they were but "a mere incident . . [of the business] to which the maxim de minimis might ell be applied, even by the National Labor Relations Board." And e conclusions of the opinion were only stated subject to the con- tion "If the case should not be dismissed for lack of jurisdiction." There was evidence before the Board which showed:

The Bradford Dyeing Association (U. S. A.), as stated by its president, is "engaged in the dyeing and finishing of cotton, rayon and acetate piece goods." These piece goods reach the plant at Bradford, Town of Westerly, Rhode Island, as unfinished "gray goods." Customers of Bradford, known as "converters", ship the gray goods to the plant, retaining title, and direct shipment of the goods when processed. Bradford owns no goods or means of transportation, and its customers pay the cost of transportation to and from the plant. A New York office is maintained, however, "where . . . solicitors [who contact converters] make their headquarters", and advertisements are run in New York papers and trade journals. A majority of Bradford's (converters) are located in States other than Rhode Island, in Baltimore, Boston, Philadelphia, Trenton, and principally in New York City. There are "very few customers" in Rhode Island. In 1936, 57,000,000 yards of goods were processed and for the first six months of 1937, 29,000,000. About ninety per cent of all goods processed, the processing taking "an average of between two and three weeks", are shipped out of Rhode Island. "More than half" of the goods processed come from beyond the borders of Rhode Island.

Incidental to its business of processing, respondent accumulates and acquires title to "remnants" which are ends of cloth processed and goods damaged in processing. In 1936, 588,000 yards of remnants were sold by respondent, ninety per cent of

which was shipped in interstate commerce. These remnants represented roughly "just less than one per cent" of the yards processed in that year. For the same year, respondent purchased $355,856.00 worth of colors and dyestuffs, weighing over 235,111 pounds, of which forty per cent came from outside of Rhode Island. The company, during 1935, averaged 688 employees, with wages of $604,614.68, and its gross income from processing was $2,026,156.00. In 1937, the employees on the payroll were nearly 800.

That this evidence was abundantly sufficient to justify exercise of jurisdiction by the Board is not now open to controversy. It is settled that the Act is applicable to a processor, who constitutes even a relatively small percentage of his industry's capacity,[4] where the materials processed are moved to and from the processor by their owners through the channels of interstate commerce,[5] and it is not material, as the court below thought, that respondent's customers might be able to secure the same services from other Rhode Island processors if a labor dispute should stop the interstate flow of materials to and from respondent's plant. Since the purpose of the Act is to protect and foster interstate commerce, the Board's jurisdiction can attach, as here, before actual industrial strife materializes to obstruct that commerce.[6]

*Second. Discharge of Nelson.*

In its answer to the Board's complaint, the company contended that Nelson was not discharged April 3, 1937, but was merely "laid off", and on April 2, "went upon a vacation" and did not return or indicate a willingness to go back to work. However, the company insists, as it has throughout, that Nelson was not a diligent worker and was insubordinate; that he trespassed upon company property after work hours Thursday, April 1st; that "one or two mornings that week he started work a little late and quit a little early"; that he did not start work Saturday, April 3, until 7:30, a half hour late.

[4] The record indicates that respondent does roughly one per cent of the national total of business in its industry.

[5] Labor Board v. Fainblatt, 306 U. S. 601.

[6] Edison Co. v. Labor Board, 305 U. S. 197, 222; cf., Labor Board v. Jones & Laughlin, 301 U. S. 1, 43. A strike at respondent's plant in 1929 apparently did result in a stoppage of the flow of the interstate movement of materials to and of processed goods from respondent's plant.

Some of the evidence supporting the Board's finding that Nelson was actually discharged for union activities on April 3, was:

Prior to Saturday, April 3, 1937, when Nelson was "laid off", he had worked for the company two years as a carpenter. He had become actively interested in organizing the employees in a C.I.O. union the preceding Monday, March 29, 1937. On that day, he had obtained three hundred and fifty T. W. O. C. cards from a fellow employee (Schofield) who, he heard, "had some applications for joining the union, the C. I. O." His distribution of the cards met with quick response and many signed so that on Friday, the company official "who does all the hiring", approached him and said, "You're a ringleader of the C. I. O., but you are not going to be fired for it." Nelson refused to tell this official the names of his collaborators in forming the union and also told him he would not reveal their names to Mr. Summersby, the company's president and general manager. Later that day, Nelson observed Schofield talking with Summersby and was introduced to the latter as "helping . . . [Schofield] to organize and get these pledge cards signed in the mill." He was, that same day, Friday, refused admission to a meeting in Summersby's office between some employees and Summersby, but that afternoon, after work, he was called to Summersby's office. There Summersby asked "why didn't we form a local union of our own" and "thought it was a much better plan to form a local union." And Summersby asked that the question of a local union be put up to a C.I.O. committee meeting to be held that night.

All day Friday and Saturday morning, his foreman "didn't speak one word to" Nelson. Saturday morning, April 3, this foreman asked him "when [he] . . . intended to start work" but added that he "didn't hold anything against" him. When Saturday's work was over, Nelson was sent for by Summersby, who was affable at first, but who became hostile when Nelson indicated he would not go along with a local union. Summersby then asked Nelson if he had been stealing on an occasion when he had returned to the plant after hours to get some T.W.O.C. cards, and asked him if he had begun work promptly that day (Saturday, April 3). Nelson was told by Summersby "to take two weeks off and cool off." Nelson insisted he was ready to go back to work Monday morning. His testimony narrated this conversation in part as follows

"A. . . . I said, 'As far as being excited about it, you are more excited than I am and you are worried about it and I ain't.' He says, 'Sure, I am excited about it, but you are the cause of all it.' I said, 'I can't help that.' He said, 'You take the two weeks off and then come back and see Mr.

Pierce,' I said, 'Meaning what, that I go back and see Mr. Pierce? I am not sure of a job when I come back? Or is this just a matter of beating about the bush to fire me?' He says, 'I won't give you nothing definite.' I says, 'I want something definite. I want to know whether or not you are firing me. If you are not telling me whether I go to work when I come back or not, I want to know whether you are firing me.' He says, 'I won't give you nothing definite.' I says, 'I can't go out without money. If you are going to fire me, I can't live without money.' He says, 'Silvia, get his money.' Mr. Silvia went out and got me my money and came in and I thanked Mr. Silvia for my money and went out. When I was halfway across the outer office I heard laughing, and I saw Silvia swing his arm down, and Mr. Silvia and Mr. Summersby were laughing for all they were worth, as though they had pulled a big joke."

"Q. Did you ever go back after that for your job? A. No I didn't. Mr. Summersby told me if I stepped foot on the premises within two weeks he was going to have me arrested."

Nelson never went back because a T.W.O.C. official who conferred with Summersby said Summersby would not take him back. This T. W. O. C. official and a Conciliator of the United States Department of Labor said Summersby wouldn't take Nelson back because "there would be a question of his authority." In fact, a fellow employee told Nelson that Summersby had said something about firing Nelson and Schofield and "that he would find some way of getting around it." On the morning of the day Nelson was fired he had spent a "couple of minutes" telling other employees about a C. I. O. meeting of the previous night.

From the testimony of the T.W.O.C. official in question, a T.W.O.C. Director for Rhode Island, Summersby would not rehire "especially Mr. Nelson." And Summersby himself stated that he told the Federal Conciliator, "I couldn't take back either of them because it would break down the discipline of our plant."

Nelson's foreman testified as a witness for respondent—

On Friday, April 2, "I could see that he [Nelson] was talking around more or less, and so I had him come in the shop to work on the trucks. I thought that would be the place where I could watch him better." He saw Nelson talking to the men early on April 3, before work and until 7:30, although work begins at 7. He reported to his superior that Nelson was "talk to different ones", and went with Nelson to Summersby who

asked Nelson "if he decided, on some question that they were talking about the afternoon before . . . . [Nelson] said, 'No,', and Summersby said, "Well, then, if you can't give me a satisfactory answer on that I have thought it over and I have decided to lay you off for two weeks and let you think it over." This foreman "knew . . . . [Nelson] was interested in the C.I.O., but . . . . didn't know anything he said" to the men Saturday morning. On other occasions, he had seen Nelson start late or quit early without ever reporting the fact, and had seen Nelson talk around like that "quite often" but "this is the only time . . . [the foreman] ever got mad at him." This time, he was aware that Nelson had been connected with the C.I.O. for the past week "and . . . supposed he was still at it." The foreman admitted that Nelson was "a very good workman", that he may have worked between 7 and 7:10 on this particular Saturday morning and that on Saturday, April 3, Nelson, after having been spoken to, "said he hadn't any feelings but what he would go on and do his work all right. And he did after that."

According to the Chief Engineer, who ranked above Nelson's foreman—

Nelson previously "did a whole lot of talking." In his three years with the company, he had seen others talking but never laid any one else off for talking. In his view "when men are talking with one another there is very little work done", but the foreman did not report the men to whom Nelson was talking on April 3, although they also were "surely" wasting time. The plant rules do not forbid talking.

Summersby, the president and general manager—

On April 2, "inquired as to who [Nelson] . . . was and what he did and if he had been active in the C.I.O. as an organizer." Nelson, he stated, "automatically forfeited his job" by not coming back at the end of his two weeks lay off, which was without pay. And if he should apply for work, his forced vacation "would be on his record and would always be a black mark against him."

*Third. Discharge of Schofield.*

The court below saw no evidence supporting the Board's finding at this employee was discharged for union activities, and accepted e company's contention that he was discharged for smoking in e plant contrary to rules. Respondent admits that Schofield was scharged.

Schofield, a machine operator, or "jigger", testified—

On Saturday, March 27, 1937, he attended a C.I.O. meeting, obtained eight application cards for the C.I.O. and talked to

some of his fellow employees about the C.I.O. All eight cards were signed that night. By Sunday, March 28, he had asked for and obtained seven hundred cards which he used during the following week, giving Nelson about one-half on Monday, March 29. By Wednesday, the cards gave out. On Friday, April 2 he and Summersby discussed certain difficulties with the piece work of "jiggers." Summersby, talking there in the plant, brought up the C.I.O. and said "he couldn't see anything in an organization outside . . . [with] . . . big shots . . . running big automobiles and hotel expenses."

Summersby then suggested "a union of our own in the shop." Schofield attended a meeting in Summersby's office as a member of a committee of "jiggers", and the subject of the C.I.O. arose again. Summersby said he wouldn't recognize an outside union. When Nelson attempted to enter this meeting, Summersby turned him away and referred to him as a "trouble-maker." Sunday, April 4, there was a C.I.O. meeting at which Schofield and Nelson were both on the platform. Schofield went to work on Monday, the 5th, continuing to distribute C.I.O. cards. On Tuesday, the 6th, at 2:25 (Nelson had been "laid off" on the 3rd), a "charge hand" notified Schofield that Summersby wanted to see him "in his office right away." He left his work and went directly to the locker room to wash and change from work clothes. While there, he and two other employees were smoking. An official of the company—a boss dyer—whom he had never seen "in the locker room, not while the men were changing their clothes"—caught Schofield smoking and said, "So that's it, you damn fool." Schofield then went to Summersby's office as he had been directed, but did not find him there. Summersby's first words, on entering the office about twenty minutes later, charged Schofield with smoking, but Summersby refused to tell Schofield why he had originally been sent for—before he was caught smoking. Schofield was told to "take a couple of weeks off." He had been laid off once before for smoking.

On the Friday before the Tuesday on which this employee would, he thought, have been taken back to work, a Federal Conciliator and C.I.O. officials conferred with Summersby about Nelson and him. The C.I.O. official told Schofield that Summersby refused to rehire either, and as a result he never went back. Although he "wanted to go back the first week", he took the word of the Federal Conciliator and the C.I.O. official that he would not be rehired. The two other employees who were smoking when he was caught were not disciplined, although the accosting official could see them. Despite "No Smoking" signs, it was the practice of the men to smoke on the sly. Other men have

been laid off two weeks for smoking, but Nelson was caught and "others" have been seen by foremen and no lay-offs resulted. Schofield didn't "know of any one being discharged" for smoking. He was made T.W.O.C. local financial secretary.

In the words of the C.I.O. official, "Mr. Summersby saw red the minute I mentioned Schofield's and Nelson's names."

As told by the boss dyer who found Schofield smoking—

This official had sent an employee to notify Schofield of Summersby's desire to see him; he himself went to the locker room to deliver the message. He asked one of the other employees in the locker room to remember the scene because he "knew Percy Schofield's character." It was his duty to detect smokers and he usually laid off, himself, any man found smoking. He had time to lay off Schofield while walking with him part of the way to Summersby's office, but he did not do so. "It was a peculiar case and I wanted to think before I did anything." This was the only case in which he had ever reported a smoker to a higher up. He had laid Schofield off for two weeks twice before, for smoking. In six or seven years, he had caught seven or eight smokers of whom, excepting Schofield, only one was discharged. He didn't go to the wash room "very often." "A very short time before" he had heard that Schofield was somewhat active in the C.I.O.

One of the fellow employees present in the locker-room where Schofield was found smoking, stated that he also had been smoking but was not doing so when the boss dyer came in, and that the third man was smoking at that time but wasn't observed. He got the impression, then, that the boss dyer said something to the effect that he at last "had" Schofield after having been after him for some time. He "had never seen . . . [the boss dyer] go to the locker room" before.

Summersby testified that he had been told by Schofield that he was "interested in organizing the C.I.O."; and that he discharged Schofield for smoking.

*Fourth. Domination of the Federation.*

As already noted, the Court of Appeals' opinion did not especially pass upon this contention. Since, however, the Court did not enforce the Board's order to cease dominating and to disestablish the Federation, as we think it should have, appropriate evidence on this issue will be pointed out.

A machinist, employed eleven years by respondent, testified—

He attended a meeting in Summersby's office on April 6, the day of Schofield's discharge. Summersby "said that he wouldn't recognize the C.I.O. and that it would be much better for us to join our own union than to be bothered by this C.I.O." which would require the men to go out on sympathy strikes. This employee saw Federation cards and literature "on the table" in the company's office. These were "handed around" and one or two were picked up by the employees present; when Summersby and the vice president of the company left the room, the employees "seemed to pick them up more frequently." Temporary officers of the Federation were chosen there, in Summersby's office. A day or so later, the Federation met in the company's shipping room with one hundred and fifty to two hundred men present; Summersby addressed the meeting and said he would not recognize the C.I.O. and that it was better to have our own union. The machinist distributed in the plant the Federation cards which he had "picked . . . up" in "Summersby's office"; the Federation cards "were there."

From testimony of other employees, it appeared that—

At the meeting on the 6th (the day Schofield was discharged) in Summersby's office, Federation cards and circulars were seen, and an employee distributed these cards; Summersby said "he would like to have this local union" and "wouldn't recognize the C.I.O." Three "jiggers" had seen Summersby on April 5 about wages and conditions of employment; he "thought it would be better if we had our own union" instead of paying outside fellows. "Someone" suggested that cards be passed out for a local union. Word was passed out by fellow workers that the company would pay for time spent at the meeting in the shipping room, at which Summersby "said he wouldn't recognize C.I.O. or A.F. of L., no outside union", that it would "be better if we had a local union" instead of paying others to ride around in big cars and that "he would not tolerate C.I.O." Workers were seen passing out Federation cards in the plant during working hours. Pay was given for the half-hour spent in the shipping room meeting and this time was included by instruction of the "boss of the frames." Federation cards were passed out "openly" by men on the day of the shipping room meeting. Bosses were seen with cards. One employee was given his Federation card by the boss of his department. Another was asked by his foreman whether he had joined the Federation.

An employee testified—

> Summersby sent for him on April 6, (the day of Schofield's discharge). The paymaster came to his house for him and said he was glad that this man wasn't "deep . . . in the C.I.O.", and took him to the office. There Summersby told him he was sorry that men in his line of work (in the gray room) had been left out of the meeting that morning in Summersby's office. This employee had told the men in the gray room that they shouldn't sign cards from a meeting at which they had not been represented. Summersby told him the C.I.O. would take money out of the plant and that a "committee had gotten together . . . to form this local union, because he informed them that he wouldn't recognize the C.I.O., and they started to organize a union that he would recognize. He said he would recognize the local." He and Summersby then went into the meeting in an adjoining office ("one is Mr. Pawson's [respondent's vice president] and the other is Mr. Summersby's"). A leader at this meeting in company offices and attended by Summersby, "said a few of them got together and decided they didn't want a C.I.O., that they thought they would be better off if they had a local union, that they had a talk with Mr. Summersby, and Mr. Summersby wouldn't recognize the C.I.O., and rather than have trouble he was going to see if we couldn't have a local union." Summersby "explained advantages of the local union and spoke of the B.D.A."

Another employee supplied evidence that a week or two after Nelson was fired, the timekeeper took him to see Summersby, who asked about a C.I.O. card which had been on the back of this employee's car, and that Summersby then "said he wouldn't recognize it" and could close the plant down.

The financial Secretary of the Federation stated—

> He was first given a temporary appointment at the meeting in Summersby's office, April 6, when Summersby said "he didn't like the idea of bargaining outside." The men present in the afternoon meeting in Summersby's office "asked for the privilege of using the office to find out how we had made out on our cards." The meeting in the shipping room was a day or so later. After the morning meeting in Summersby's office on the 6th, this temporary Federation official started passing out Federation cards for which Summersby had given permission. Federation circulars were posted on plant bulletin boards. Federation application cards were passed out by "all of us that were in the office at that first meeting." Officers of the Federation were subsequently elected (April 11). "All us men

who were in the office the first day, I think we acted as a committee." Between April 6 and 11, Summersby permitted the temporary committee to meet in an old company office in the plant. The paymaster gave them a list of the men in the plant by which to determine the necessary fifty-one per cent. On April 9, prior to the election of the Federation's officers on the 11th, this temporary committee presented a letter to Summersby stating that they represented fifty-one per cent of the men. That same day, Summersby granted recognition to the Federation. This employee felt no need for organization, except for "better feeling" which he thought "was necessary because the C.I.O. was going to do the same thing." He helped form the Federation "partly" to stop the C.I.O., and because the C.I.O. had already started. A company car was used by him on one occasion for purposes of the Federation. Meetings of the executive committee of the Federation were held in a club room "on property owned by the B.D.A." This witness engaged as attorney for the Federation one who he knew "had represented . . . . [the company] on some cases"; he himself lives in a house owned by the company. Some Federation dues were collected on the company's premises; members were not suspended for dues delinquency and may also be members of any labor union or society. The Federation started about a week after the C.I.O. drive; it had no income of its own prior to the last week in April. Eventually it affiliated with an outside union still designated "as the B.D.A. Employees' Federation" "to bring a little more prestige and to prove to the ones that were skeptical, that we were not a company union."

The first vice president of the Federation testified—

He negotiated recognition of the Federation, April 9, (three and six days respectively after discharge of Schofield and Nelson) as its acting president. On that day, he called a meeting of the organizing committee in "the little office in the gray room", showed them that they had fifty-one per cent signed cards, and then went to Summersby's office. In Summersby's office, the witness and company officials counted the signed cards and checked them against a list of employees which Summersby asked the paymaster to get. The cards were not checked to see if each signer was eligible; the management took the temporary committee's word for it. And the cards were left with Summersby. The witness didn't know that the Federation planned to do anything that "was any different" from what the employees previously could have done by grievance committees. He had heard rumors that a boss had Federation cards or spoke to employees about them, and believed one man quit work as the result of posting C.I.O. hand-bills. He spoke at the

shipping room meeting and asked Summersby to speak there. Summersby did speak. Along the lines of his conversation at the two previous meetings in his office, Summersby told this gathering of employees that he preferred a local and "was not in favor of bargaining with the C.I.O."

T.W.O.C.'s State Director for Rhode Island stated—

> On April 7, he saw Summersby and told him T.W.O.C. had "about seventy-five per cent" of the men signed. Summersby refused to say then that he would recognize T.W.O.C. April 16, the Director, a Federal Conciliator and a T.W.O.C. organizer saw Summersby again and were told by Summersby that "he had a union" and wouldn't recognize the C.I.O. as he was "afraid of an outside union." It was agreed that he would hear from Summersby's attorney after the first (April 7) meeting, but he never heard. A form contract was submitted to Summersby on the 16th, but by that date "he had definitely decided that he would refuse to bargain with the C.I.O."

According to the company's vice-president—

> He was present part of the time at one of the meetings in Summersby's office on April 6, where cards and literature were present and a union was discussed. Summersby was heard to express the opinion "that he would prefer to deal with a union of his own employees rather than to deal with outside influences."

One of the men present when Schofield was found smoking testified that a salaried employee who reports "things which are done wrong" came around and asked everybody if he had joined the local union; at the meeting in the shipping room, Summersby said he would not recognize the C.I.O. but would recognize a local; the witness was paid for the fifteen minutes spent at that meeting; the men were told by the time-keeper that they would be so paid. An official of the Federation said, "The impression was that Mr. Summersby probably wouldn't recognize" the C.I.O.; this official was "one of the first" organizers of the Federation and conveyed to people the impression that Summersby wouldn't recognize the C.I.O.

As related by Summersby, president and general manager of respondent—

> A wage increase was announced March 31. After he met in his office on April 6, (the day of Nelson's discharge) with the committee of "jiggers", later the same day he was asked for a place in which the Federation's temporary committee could

meet. He answered the request by saying, "You can have my office and make yourselves comfortable." That afternoon, as he was ready to leave, the temporary committee met in his office and he was "advised that they were organizing a local union . . . . . I told them that I would grant them the same privileges I would grant any other union . . . . ." Two days after recognizing the Federation, he placed and paid for an ad in a local paper, entitled "The Strike that Failed" because in part, as he said, "the B.D.A. Employees' Federation had formed and had taken the organization into their own hands, and had shown that they were still real citizens." Respondent is owned by an English concern and a statement by him appeared in the local paper, on April 25, disclosing the possibility of the company's moving the plant out of the United States if there were to be "labor uncertainties."

He recognized the Federation April 9, and on April 13, told the Federal Conciliator that an election could not be held, since the Federation had already been recognized. And on the 16th, Summersby told Salerno that his proposed T.W.O.C. contract would be taken up with Summersby's lawyer.

*Fifth. Designation of T.W.O.C. as bargaining agent.*

The court below found no substantial evidence to support the Board's finding that a majority of respondent's employees joined the T.W.O.C., or that "the T.W.O.C. . . . ever came into actual existence with authority to negotiate a contract with the respondent." Much of the testimony already referred to bore upon the genesis of T.W.O.C. at respondent's plant.

Schofield said:

> By April 4 he had "four hundred and sixty-five or four hundred and sixty-seven" signed application cards "marked down." The cards were sent to Boston. A few men paid dues but collection was stopped. " . . . we had a majority of cards signed." Dues are not collected until management grants recognition. No local C.I.O. (T.W.O.C.) entity had been formed for the plant; "we had the fifty-one per cent, but this company union stuff, and discharge and everything came along, and we have just had to wait for this hearing . . . ."

Nelson stated that he told the timekeeper, on April 2, "It's all over but the shouting . . . . We have well over sixty per cent signed up all ready." And from the testimony of an officer of the Federation it appeared that the C.I.O. drive resulted in a number of signatures, and that both organizations could possibly claim fifty-one per cent of the employees signed up.

As explained by the T.W.O.C. State Director—

> A charter or local is unnecessary for membership in T.W.O.C.; no charter to a local is granted until after recognition. Members of the Federation are members in good standing of T.W.O.C., even if they have not paid dues or initiation fees. The T.W.O.C. cards were brought to him during the first week in April. Summersby, April 9, refused to agree to have the Federal Conciliator, or a third party, count the T.W.O.C. cards. Employees are eligible to membership in T.W.O.C., without formation of a plant local.

The T.W.O.C. Director's Secretary stated that the T.W.O.C. rds were brought in before April 12. It was agreed at the hear- g that, after respondent checked against the original signed cards, W.O.C. had a list of four-hundred and eighty-two names taken om those cards. And it was stipulated that these cards were gned "on or before April 10, 1937."

*Shift in membership.*

Respondent has contended before the Board, as here, that if the W.O.C. did actually represent a majority of its employees on pril 4 (as the Board found), a shift in membership had given the ederation a majority when the company on April 9 recognized it exclusive bargaining representative. However, the Board found at "the record is clear that, had it not been for the unfair labor ractices of the respondent in organizing and fostering the Federa- on and in persuading, intimidating and coercing its employees to in the Federation and leave the T.W.O.C., the respondent's em- oyees would have remained members of the T.W.O.C." In view the substantial support in the evidence for the Board's findings at the company intimidated and coerced its employees and domi- ated the Federation, the Board properly concluded that "The un- ir labor practices of the respondent cannot operate to change the rgaining representative previously selected by the untrammelled ill of the majority."[7] And, accordingly, the Board was justified its finding "that on April 4, 1937, and at all times thereafter, e T.W.O.C., pursuant to Section 9(a) of the Act, was the exclu- ve representative of all the employees in the appropriate unit for rposes of collective bargaining . . . ."

[7] Cf. Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548, 557, 571, affirming F. (2d) 13, affirming 24 F. (2d) 426; 25 *id.* 873; 25 *id.* 876, 877-8.

*Sixth. The "Sit Down."*

As one of the apparently alternative grounds of its decision, the Circuit Court of Appeals declared the Board without authority to order reinstatement of Nelson and Schofield because of so-called unlawful conduct and the alleged incitement of a "sit down" strike within the meaning of the *Fansteel* case.[8] The opinion stated that "Nelson even threatened truck drivers delivering materials to the plant with violence, and to destroy the spur track over which materials were delivered to the plant, . . . . The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts, which it is not denied were committed in this instance, would not only effectuate the policy of the act, but would directly tend to make abortive its plan for peaceable procedure."

We find no such issue raised by respondent's pleadings before the Board. Respondent made request for special findings by the Board, but included none that Nelson and Schofield had been guilty of any unlawful conduct. Nelson categorically denied having made threats of violence. The court was apparently referring to the testimony of a truck driver, which appears in the record. An objection of the Board's representative to the introduction of this particular testimony was overruled by the trial examiner when respondent's attorney made the following statement: "If your Honor please, may I point out that while Mr. Nelson was on the witness stand in cross-examination I asked him if he did not say certain things at this time and place, that this witness has been referring to, which the witness Nelson denies. The testimony of this witness that Nelson did say those things is in contradiction of Mr. Nelson's testimony and is clearly admissible as tending to impeach the veracity of Mr. Nelson's testimony. Aside from that I also submit it as bearing on the type of conduct and the attitude of the representatives and organizers of this T.W.O.C. getting membership and conducting the affairs of this organization."

[8] Labor Board v. Fansteel Corp., 306 U. S. 240.

This truck driver's helper testified that on the morning of April 8, after Schofield and Nelson had been laid off, he saw Nelson, Schofield and a third "little fellow from the C.I.O." "outside the mill yard." He noticed Nelson "going up and down motioning . . . Going like this [illustrating by waving arms, squatting and standing.]" As this truck driver recollected, Schofield was not "doing anything." "If anybody was looking out the east door they could" see Nelson or Schofield moving their hands that morning; Nelson "made a motion to sit down, that is all," out "on the main road going to the plant." He "couldn't say that" any workers would have seen Nelson; he "couldn't say that, whether they could see out or not. I don't know." An employee, not Nelson or Schofield, who "went through the department shouting 'Sit-down strike,'" was taken for an automobile ride by the company's vice president, talked to, given lunch and sent home to bed without loss of pay and was still working for the company at the time of the hearing. When asked, "You remember you said, 'Well, we can blow up the railroad?'", Nelson answered, "No, absolutely not."

In vacating the Board's order of reinstatement on the ground that undenied evidence showed that Nelson and Schofield had, after their unlawful discharge, incited or threatened unlawful conduct, the court acted without any justification.

Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a "hearing", which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. Until granted such enforcement, the Board is powerless to act upon the parties before it. And the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required.

Mindful of the separate responsibilties Congress has imposed upon the Board and the courts, we have carefully scrutinized this entire

record. Within the range of our examination has appeared not merely the testimony but also the procedure followed from the filing of the charge before the Board to final decree of the Court of Appeals. The Board and its representatives solicitously guarded respondent's and intervenor's right to a full and fair hearing; manifested liberality in ruling upon evidence proposed by both sides; and conducted the proceedings in a manner calculated to bring about a just result. And as we have pointed out, substantial evidence supported the result which the Board did reach.[9] Notwithstanding, the court below declined to order enforcement of the Board's order, and the implications of its opinion are that the Board without a proper regard for either the limitations on its power or the evidence made findings all of which had no substantial support.

But in reaching this conclusion the Court of Appeals itself failed to give proper regard to the evidence which was before the Board, which appeared in the record before the court and which we have set out in this opinion. In refusing to enforce the Board's order, the court exceeded the power given it. The cause is reversed and remanded with directions to enforce the Board's order without conditions or qualifications.

*Reversed.*

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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[9] Accepting the underlying findings of the Board, as we do, it was within the province of the Board to draw the inferences that the guarantees of Section 7 of the Act required disestablishment of the Federation (*Falk* case, *supra*, p. —, and cases cited), and that posting of appropriate notices was necessary. *Id.*